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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 DOMINGO GERMAN MACAVILCA,

11 Plaintiff,

12 v.

13 ALYSSA McCLUSKEY, et al.,

14 Defendants.
15

Case No. C08-5263RJB

ORDER ON REPORT
AND
RECOMMENDATION

16 This matter comes before the court on the Report and Recommendation of the Magistrate Judge.
17 Dkt. 10. The court has considered the relevant documents and the remainder of the file herein.

18 On April 25, 2008, plaintiff filed a civil rights action against Alyssa McCluskey, Ben Maxwell,
19 William Penaloza, and A. Neil Clark, employees at the Northwest Detention Center. Dkt. 1. On June 5,
20 2008, the court issued an order, notifying plaintiff of the deficiencies in his original complaint, and directed
21 him to file an amended complaint. Dkt. 8. On June 17, 2008, plaintiff filed a first amended complaint.
22 Dkt. 7. The first amended complaint alleges the following claim against defendant Alyssa McCluskey:

23 From around January 2007 until now, the Recreation Specialist Alyssa McCluskey sexually
24 assaulted me, in the Law Library in the Northwest Detention Center (NWDC), by Grabbing and
25 Feeling my Penis and Balls for several seconds, on her every working day, when I entered and left
the Law Library[.]

26 Dkt. 7, at 5. *Emphasis omitted.*

27 The amended complaint also alleged that the other named defendants were violating or have
28 violated his rights during his deportation proceedings. Dkt. 7.

1 On June 26, 2008, the court issued a second order, informing plaintiff that the first amended
2 complaint was defective because his claims challenging the validity of his detention were barred by *Heck v.*
3 *Humphrey*, 512 U.S. 477 (1994); and that “[a]s plaintiff states a possible viable claim against defendant
4 McCluskey, for the way she searches him when he enters the library, his action should not be dismissed
5 without giving him another opportunity to amend.” Dkt. 8, at 2. Plaintiff was directed to file an amended
6 complaint by July 25, 2008. *Id.* at 3. Plaintiff did not file an amended complaint by July 25, 2008.

7 On August 11, 2008, U.S. Magistrate Judge J. Kelley Arnold issued a Report and
8 Recommendation, recommending that the court dismiss the complaint without prejudice because plaintiff
9 did not comply with the court’s orders that he file acceptable amended complaints. Dkt. 10.

10 On August 28, 2008, plaintiff filed a second amended complaint. Dkt. 12. The second amended
11 complaint stated that the allegations in the original complaint remain the same with regard to each
12 defendant. Those allegations are that defendants Ben Maxwell, William Penalize, and A. Neil Clark are
13 violating and have violated his constitutional rights in connection with his deportation proceedings. Dkt.
14 12. With regard to Ms. McCluskey, plaintiff has asked for the following relief: “Wherefore plaintiff moves
15 this court to order defendant Alyssa McCluskey and her employer the GEO corp. to pay plaintiff ten
16 million dollars for psychological/mental anguish by her behavior[.]” Dkt. 12, at 1. Although plaintiff did
17 not file a motion to file his second amended complaint, and although that second amended complaint was
18 not timely filed, in the interest of fairness to plaintiff, the court will accept the amended complaint for filing.

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20 The court concurs with the Magistrate Judge, in his orders directing plaintiff to file an amended
21 complaint, that plaintiff’s claims against Ben Maxwell, William Penalize, and A. Neil Clark are barred by
22 *Heck v. Humphrey*, *supra.*, because the claims challenge the fact or duration of his confinement, and
23 plaintiff has not shown that the basis for his confinement has been invalidated. With regard to plaintiff’s
24 claim against Ms. McCluskey, plaintiff has stated a claim, as quoted above from plaintiff’s first amended
25 complaint (Dkt. 7), and as set forth in her claim for relief in her second amended complaint (Dkt. 12). The
26 claim against Ms. McCluskey should be permitted to proceed.

1 Therefore, it is hereby

2 **ORDERED** that the amended complaint filed on August 28, 2008 (Dkt. 12) is **ACCEPTED FOR**
3 **FILING**. The Report and Recommendation of the Magistrate Judge (Dkt. 10) is **ADOPTED IN PART**
4 **AND REJECTED IN PART**, as follows: (1) Plaintiff's claims against defendants Ben Maxwell, William
5 Penaloza, and A. Neil Clark are **DISMISSED** as barred by *Heck v. Humphrey, supra.*; and (2) plaintiff's
6 claim against Alyssa McCluskey, as set forth above, may proceed.

7 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any
8 party appearing *pro se* at said party's last known address. The Clerk is directed to re-refer the case to the
9 Magistrate Judge.

10 DATED this 8th day of September, 2008.

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12 ROBERT J. BRYAN
13 United States District Judge
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